

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
GRAYS HARBOR COUNTY

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

CITY OF ABERDEEN & GRAYS HARBOR
HISTORICAL SEAPORT AUTHORITY,

Defendants.

Case No.:

CONSENT DECREE

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	JURISDICTION	4
III.	PARTIES BOUND	4
IV.	DEFINITIONS	5
V.	STATEMENT OF FACTS	5
VI.	WORK TO BE PERFORMED.....	7
VII.	DESIGNATED PROJECT COORDINATORS.....	7
VIII.	PERFORMANCE.....	8
IX.	ACCESS	8
X.	SAMPLING, DATA REPORTING, AND AVAILABILITY	9
XI.	PROGRESS REPORTS.....	10
XII.	RETENTION OF RECORDS	11
XIII.	TRANSFER OF INTEREST IN PROPERTY	11

1	XIV.	FINANCIAL ASSURANCES	12
2	XV.	RESOLUTION OF DISPUTES	12
3	XVI.	AMENDMENT OF CONSENT DECREE	14
4	XVII.	EXTENSION OF SCHEDULE	14
5	XVIII.	ENDANGERMENT	15
6	XIX.	OTHER ACTIONS.....	16
7	XX.	INDEMNIFICATION	17
8	XXI.	COMPLIANCE WITH APPLICABLE LAWS	18
9	XXII.	REMEDIAL AND INVESTIGATIVE COSTS	19
10	XXIII.	IMPLEMENTATION OF REMEDIAL ACTION.....	20
11	XXIV.	PUBLIC PARTICIPATION	20
12	XXV.	FIVE YEAR REVIEW	21
13	XXVI.	DURATION OF DECREE.....	21
14	XXVII.	CLAIMS AGAINST THE STATE.....	21
15	XXVIII.	COVENANT NOT TO SUE	22
16	XXIX.	RESERVATION OF RIGHTS	23
17	XXX.	CONTRIBUTION PROTECTION.....	23
18	XXXI.	EFFECTIVE DATE.....	24
19	XXXII.	PUBLIC NOTICE AND WITHDRAWAL OF CONSENT	24
20	Exhibit A	– Cleanup Action Plan	
21	Exhibit B	– Site Diagram	
22	Exhibit C	– Restrictive Covenant	
23	Exhibit D	– Legal Description	
24	Exhibit E	– Scope of Work and Schedule	
25			
26			

I. INTRODUCTION

A. In entering into this Consent Decree (Decree), the mutual objective of the Washington State Department of Ecology (Ecology), The Grays Harbor Historical Seaport Authority (GHSA), and the City of Aberdeen (City) is to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances. This Decree requires the City and GHSA (hereinafter referred to as "Defendants") to undertake the remedial actions described in the Cleanup Action Plan attached hereto as Exhibit A, and also requires the Defendants to undertake other actions as described in the Scope of Work and Schedule, attached as Exhibit E. Ecology has determined that these actions are necessary to protect human health and the environment. The City has applied for grant funding which may be used to finance the work described in the Cleanup Action Plan.

B. The Complaint in this action is being filed simultaneously with this Decree. An answer has not been filed, and there has not been a trial on any issue of fact or law in this case. However, the parties wish to resolve the issues raised by Ecology's Complaint. In addition, the parties agree that settlement of these matters without litigation is reasonable and in the public interest and that entry of this Decree is the most appropriate means of resolving these matters.

C. In signing this Decree, the Defendants agree to its entry and agree to be bound by its terms.

D. By entering into this Decree, the parties do not intend to discharge nonsettling parties from any liability they may have with respect to matters alleged in the Complaint. The Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for sums expended under this Decree.

E. This Decree shall not be construed as proof of liability or responsibility for any releases of hazardous substances or cost for remedial action nor an admission of any facts; provided, however, that the Defendants shall not challenge the jurisdiction of Ecology in any proceeding to enforce this Decree.

1 F. The Court is fully advised of the reasons for entry of this Decree, and good
2 cause having been shown: IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS
3 FOLLOWS:

4 II. JURISDICTION

5 A. This Court has jurisdiction over the subject matter and over the parties pursuant
6 to Chapter 70.105D RCW, the Model Toxics Control Act (MTCA).

7 B. Authority is conferred upon the Washington State Attorney General by RCW
8 70.105D.040(4)(a) to agree to a settlement with any potentially liable person (PLP) if, after
9 public notice and public hearing, Ecology finds the proposed settlement would lead to a more
10 expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that such a
11 settlement be entered as a Consent Decree issued by a court of competent jurisdiction.

12 C. Ecology has determined that a release or threatened release of hazardous
13 substances has occurred at the Site which is the subject of this Decree.

14 D. Ecology has given notice, as set forth in RCW 70.105D.020(15), that there has
15 been a release or threatened release of hazardous substances at the Site. Notice was given to
16 GHHSa by letter dated March 31, 2003. The City of Aberdeen identified its intention to be a
17 PLP for purposes of settlement by letter dated March 27, 2003.

18 E. The actions to be taken pursuant to this Decree will protect human health,
19 welfare, and the environment.

20 F. Defendants have agreed to undertake the actions specified in this Decree and
21 consent to the entry of this Decree under the MTCA.

22 III. PARTIES BOUND

23 This Decree shall apply to and be binding upon the signatories to this Decree (parties),
24 their successors and assigns. The undersigned representative of each party hereby certifies that
25 he or she is fully authorized to enter into this Decree and to execute and legally bind such party
26 to comply with the Decree. The Defendants agree to undertake all actions required by the

1 terms and conditions of this Decree and not to contest state jurisdiction regarding this Decree.
2 No change in ownership, corporate, or municipal status shall alter the responsibility of the
3 Defendants under this Decree. The Defendants shall make a copy of this Decree available to
4 all agents, subcontractors, and contractors retained to perform work required by this Decree
5 and shall ensure that all work undertaken by such contractors and subcontractors shall be in
6 compliance with this Decree.

7 **IV. DEFINITIONS**

8 Except for as specified herein, all definitions in WAC 173-340-200 apply to the terms
9 in this Decree.

10 A. Site: For purposes of this Decree, the Site, referred to as the Roderick Timber
11 Site, is located Southeast of the junction of Stanley and Hagara Streets in Grays Harbor
12 County, Junction City neighborhood, Washington. The Site is more particularly described in
13 Exhibit B to this Decree, which is a detailed Site diagram, and Exhibit D a legal description.

14 B. Parties: Refers to the Washington State Department of Ecology, the Grays
15 Harbor Historical Seaport Authority, and the City of Aberdeen, collectively.

16 C. Consent Decree or Decree: Refers to this Consent Decree and each of the
17 exhibits to the Decree. All exhibits are integral and enforceable parts of this Consent Decree
18 and the terms "Consent Decree" or "Decree" shall include all Exhibits to the Consent Decree.

19 D. Days: Refers to calendar days, unless specified otherwise.

20 E. Defendants: Refers to the Grays Harbor Historical Seaport Authority and the
21 City of Aberdeen, collectively.

22 **V. STATEMENT OF FACTS**

23 Ecology makes the following finding of facts without any express or implied
24 admissions by the City or the GHHSA.
25
26

1 1. Historic activities at the Site included landfilling (with woodwaste, dredge
2 spoils, and garbage) and truck maintenance associated with Roderick Timber Company
3 operations.

4 2. Ecology identified the City as a potentially liable person (PLP) as a result of
5 contribution of municipal garbage to the landfill, which operated over 30 years ago. The City
6 of Aberdeen identified its intent to be a PLP for purposes of settlement by letter dated march
7 27, 2003.

8 3. Activities at the Site have resulted in the presence of hazardous substances,
9 including petroleum hydrocarbons, polycyclic aromatic hydrocarbons (PAHs), arsenic and
10 chromium in excess of MTCA Method A criteria in some portions of the Site; affected media
11 include soils and sediments, groundwater and surface water.

12 4. The GHHSA purchased the Site in 1998 and remains the current owner. Their
13 on-site activities have included operation of a shop for construction of wooden ships and ship
14 parts, and classroom-type instruction of high-school-age children in these types of construction
15 activities. Ecology identified GHHSA as a potentially liable person (PLP) as a result of
16 ownership. Notice of this determination was provided by letter dated March 31, 2003.

17 5. During the late 1980s and 1990s, private parties and Ecology undertook
18 investigations at the Site to characterize the nature and extent of contamination at the Site. The
19 studies and also response actions pre-dating this Decree are outlined in the RI/FS Report.

20 6. During the period 2000-2002, with the advice and oversight of Ecology and
21 pursuant to a Brownfields Pilot Grant, the City undertook investigations at the Site to further
22 characterize the current nature and extent of contamination at the Site. The City prepared
23 various reports. With the benefit of community involvement, the City submitted a November
24 2002 Final Draft Remedial Investigation/Feasibility Study Report to Ecology.

1 7. Ecology has determined that a release of hazardous substances at the Site
2 requires remedial action to protect human health and the environment. This Decree sets forth
3 remedial measures necessary to clean up the Site in compliance with the MTCA.

4 **VI. WORK TO BE PERFORMED**

5 This Decree contains a program designed to protect human health, welfare and the
6 environment from the known release, or threatened release, of hazardous substances or
7 contaminants at, on, or from the Site. The Defendants agree to perform the remedial actions in
8 the Cleanup Action Plan attached hereto as Exhibit A, as well as in accord with the Scope of
9 Work and Schedule attached hereto as Exhibit E. Work will be conducted in accordance with
10 Chapter 70.105D RCW and Chapter 173-340 WAC unless otherwise provided herein.

11 **VII. DESIGNATED PROJECT COORDINATORS**

12 The project coordinator for Ecology is:

13 Dominick Reale, Site Manager
14 Department of Ecology
15 Southwest Regional Office
16 P.O. Box 47775
17 Lacey, WA 98504
18 (360) 407-6266

19 The project coordinator for the City is:

20 Lisa Scott
21 City of Aberdeen, Planning Department
22 200 East Market Street
23 Aberdeen, WA 98520
24 (360) 537-3238

25 The project coordinator for the GHHS is:

26 Les Bolton
Grays Harbor Historical Seaport Authority
P.O. Box 2019
Aberdeen, WA 98520
(360) 532-8611

1 Each project coordinator shall be responsible for overseeing the implementation of this
2 Decree. The Ecology project coordinator will be Ecology's designated representative at the
3 Site. To the maximum extent possible, communications between Ecology and the Defendants
4 and all documents, including reports, approvals, and other correspondence concerning the
5 activities performed pursuant to the terms and conditions of this Decree, shall be directed
6 through the project coordinators. The project coordinators may designate, in writing, working
7 level staff contacts for all or portions of the implementation of the remedial work required by
8 this Decree. The project coordinators may agree to minor modifications to the work to be
9 performed without formal amendments to this Decree. Minor modifications will be
10 documented in writing by Ecology.

11 Any party may change its respective project coordinator. Written notification shall be
12 given to the other parties at least ten (10) calendar days prior to the change.

13 **VIII. PERFORMANCE**

14 All work performed pursuant to this Decree shall be under the direction and
15 supervision, as necessary, of a professional engineer, or hydrogeologist, with experience and
16 expertise in hazardous substance Site investigation and cleanup. Any construction work must
17 be under the supervision of a professional engineer. The Defendants shall notify Ecology in
18 writing as to the identity of such engineer(s) or hydrogeologist(s), or others and of any
19 contractors and subcontractors to be used in carrying out the terms of this Decree, in advance
20 of their involvement at the Site.

21 **IX. ACCESS**

22 Ecology or any Ecology authorized representatives, the City of Aberdeen, and any of
23 their contractors or subcontractors, while in the process of carrying out the requirements of this
24 Decree, shall have the authority to enter and freely move about all property at the Site at all
25 reasonable times for the purposes of, inter alia: inspecting records, operation logs, and
26 contracts related to the work being performed pursuant to this Decree; reviewing the

1 Defendants' progress in carrying out the terms of this Decree; conducting such tests or
2 collecting such samples as Ecology may deem necessary; using a camera, sound recording, or
3 other documentary type equipment to record work done pursuant to this Decree; and verifying
4 the data submitted to Ecology by the Defendants. In addition, to the extent such documents
5 exist at City offices, the Parties will have the right to visit City offices for such inspections.
6 The Department and the Defendants acknowledge that the City and the GHSA do not own a
7 portion of the area proposed for excavation. The Respondents will use reasonable efforts to
8 obtain access. Ecology or any Ecology authorized representative shall give reasonable notice
9 before entering any Site property unless an emergency prevents such notice

10 **X. SAMPLING, DATA REPORTING, AND AVAILABILITY**

11 With respect to the implementation of this Decree, Defendants shall make the results of
12 all sampling, laboratory reports, and/or test results generated by them, or on their behalf
13 available and shall submit these results in accordance with Section XI of this Decree.

14 In accordance with WAC 173-340-840(5), ground water sampling data shall be
15 submitted according to Section XI. These submittals shall be provided to Ecology in
16 accordance with Section XI of this Decree.

17 If requested by Ecology, Defendants shall allow split or duplicate samples to be taken
18 by Ecology and/or its authorized representatives of any samples collected by the Defendants
19 pursuant to the implementation of this Decree. Defendants shall provide Ecology with notice
20 at least seven (7) days in advance of any sample collection or work activity as part of this
21 Consent Decree at the Site. Ecology shall, upon request, allow split or duplicate samples to be
22 taken by Defendants or their authorized representatives of any samples collected by Ecology
23 pursuant to the implementation of this Decree provided it does not interfere with Ecology's
24 sampling. Without limitation on Ecology's rights under Section IX, Ecology shall endeavor to
25 notify Defendants prior to any sample collection activity.
26

XI. PROGRESS REPORTS

Defendants shall submit to Ecology written progress reports monthly upon completion of the Final Engineering Design Report (Task 2 of Exhibit E) and continuing through the construction of the Final Cleanup Action (Task 3 of Exhibit E). Semi-annual performance monitoring reports shall begin upon the completion of construction, and shall continue for two (2) years thereafter. After the two-year Performance Monitoring period, begins the Operation and Maintenance phase of the plan; during which time written progress reports shall be submitted annually. Progress reports shall describe the actions taken during the previous reporting period and planned activities for the upcoming reporting period to implement the requirements of this Decree. All progress reports shall be submitted by the tenth day of the month in which they are due after the effective date of this Decree. (See Scope of Work, Exhibit E). Unless otherwise specified, progress reports and any other documents submitted pursuant to this Decree shall be sent by certified mail, return receipt requested, to Ecology's project coordinator. Performance Monitoring reports shall be prepared in conformance with Exhibit E (Scope of Work and Schedule), Task 1, (Performance Monitoring). Operation and Maintenance phase reports shall be prepared in conformance with Exhibit E, Task 1 (Confirmational Monitoring). All progress reports shall include the following:

- A. A list of on-Site activities that have taken place during the previous reporting period pursuant to this Consent Decree;
- B. Detailed description of any deviations from required tasks not otherwise documented in project plans or amendment requests;
- C. Description of all deviations from the schedule during the previous reporting period and any planned deviations in the upcoming reporting period;
- D. For any deviations in schedule, a plan for recovering lost time and maintaining compliance with the schedule;

1 E. All raw data (including laboratory analysis) received by the Defendants during
2 the past reporting period and identification of the source of the sample; and

3 F. A list of deliverables for the upcoming reporting period if different from the
4 schedule.

5 XII. RETENTION OF RECORDS

6 The Defendants shall preserve, during the pendency of this Decree and for ten (10)
7 years from the date this Decree is no longer in effect, all records, reports, documents, and
8 underlying data in their possession relevant to the implementation of this Decree and shall
9 insert in contracts with project contractors and subcontractors a similar record retention
10 requirement. Upon request of any party, the other party or parties shall make all non-archived
11 records developed pursuant to this Decree available and allow access for review. All archived
12 records shall be made available to the requesting party within a reasonable period of time.

13 XIII. TRANSFER OF INTEREST IN PROPERTY

14 This Site is subject to a restrictive covenant, Exhibit C of this Decree. This restrictive
15 covenant provides that no voluntary or involuntary conveyance or relinquishment of title,
16 easement, leasehold, or other interest in any portion of the Site shall be consummated without
17 provision for continued operation and maintenance of any containment system, treatment
18 system, and/or monitoring system required pursuant to this Decree to the extent such activities
19 are required by Ecology after implementation of the Cleanup Action Plan.

20 Prior to transfer of any legal or equitable interest in all or any portion of the property,
21 the current owner of the Site, GHHSA, shall serve a copy of this Decree upon any prospective
22 purchaser, lessee, transferee, assignee, or other successor in interest of the property; and, at
23 least thirty (30) days prior to any transfer, GHHSA shall notify Ecology of said contemplated
24 transfer. The GHHSA shall restrict leases to uses and activities consistent with this Consent
25 Decree and notify all lessees of the restrictions on the use of the property.

Pursuant to WAC 173-340-440(11), Ecology shall, as appropriate, require the City and/or GHHSa to maintain sufficient and adequate financial assurance mechanisms at the Site unless the City or GHHSa can demonstrate that: (1) sufficient financial resources are available and in place to provide for the long-term effectiveness of engineered and institutional controls adopted as part of the remedial action for the Site; or (2) imposition of financial assurances will result in insufficient funds to conduct the remedial action or will force the City or GHHSa into bankruptcy or similar financial hardship. Financial assurances shall be of sufficient amount to cover all costs associated with the operation and maintenance of the remedial action, including institutional controls, compliance monitoring, and corrective measures.

Within sixty (60) days of the effective date of this Decree, the City and GHSSA shall submit to Ecology for review and approval an estimate of the costs that they will incur in carrying out the terms of this Decree, including operation and maintenance and compliance monitoring. Within sixty (60) days after Ecology approves the aforementioned cost estimate, the City and GHSSA shall provide proof of financial assurances sufficient to cover all such costs in a form acceptable to Ecology. The City and GHSSA shall update the estimated cost of performing their obligations under this Decree every year. If the estimated cost of performance increases beyond the amount for which the City and GHSSA have previously provided financial assurance, the City and GHSSA shall promptly provide financial assurance for the additional costs.

A. In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by Ecology's project coordinator, the parties shall utilize the dispute resolution procedure set forth below.

1 (1) Upon receipt of the Ecology project coordinator's decision regarding
2 Defendant(s) request for a decision or action, the Defendants have fourteen (14) days within
3 which to notify Ecology's project coordinator of its objection to the decision.

4 (2) The parties' project coordinators shall then confer in an effort to resolve
5 the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days,
6 Ecology's project coordinator shall issue a written decision.

7 (3) Defendants may then request Ecology management review of the
8 decision. This request shall be submitted in writing to the Toxics Cleanup Program Manager
9 within seven (7) days of receipt of Ecology's project coordinator's written decision.

10 (4) Ecology's Program Manager shall conduct a review of the dispute and
11 shall issue a written decision regarding the dispute within thirty (30) days of the Defendant's
12 request for review. The Program Manager's decision shall be Ecology's final decision on the
13 disputed matter.

14 B. If Ecology's final written decision is unacceptable to the Defendants, the
15 Defendants have the right to submit the dispute to the Court for resolution. The parties agree
16 that one judge should retain jurisdiction over this case and shall, as necessary, resolve any
17 dispute arising under this Decree. In the event a Defendant presents an issue to the Court for
18 review the Court shall review the action or decision of Ecology on the basis of whether such
19 action or decision was arbitrary and capricious and render a decision based on such standard of
20 review.

21 C. The parties agree to only utilize the dispute resolution process in good faith and
22 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
23 Where any party utilizes the dispute resolution process in bad faith or for purposes of delay,
24 any other party may seek sanctions.
25
26

1 **XVI. AMENDMENT OF CONSENT DECREE**

2 A. This Decree may only be amended by a written stipulation among the parties to
3 this Decree that is entered by the Court or by order of the Court. Such amendment shall
4 become effective upon entry by the Court. Agreement to amend shall not be unreasonably
5 withheld by any party to the Decree.

6 B. Defendants shall submit any request for an amendment to Ecology for approval.
7 Ecology shall indicate its approval or disapproval in a timely manner after the request for
8 amendment is received, but no longer than thirty (30) days after receipt of the request. If the
9 amendment to the Decree is substantial, Ecology will provide public notice and opportunity for
10 comment. Reasons for the disapproval shall be stated in writing. If Ecology does not agree to
11 any proposed amendment, the disagreement may be addressed through the dispute resolution
12 procedures described in Section XV of this Decree.

13 **XVII. EXTENSION OF SCHEDULE**

14 A. An extension of schedule shall be granted only when a request for an extension
15 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
16 deadline for which the extension is requested, and good cause exists for granting the extension.
17 All extensions shall be requested in writing. The request shall specify the reason(s) the
18 extension is needed.

19 An extension shall only be granted for such period of time as is reasonable under the
20 circumstances. A requested extension shall not be effective until approved by Ecology or the
21 Court. Ecology shall promptly act upon any written request for an extension. It shall not be
22 necessary to formally amend this Decree pursuant to Section XVII when a schedule extension
23 is granted.

24 B. The burden shall be on the Defendant(s) to demonstrate to the satisfaction of
25 Ecology that the request for such extension has been submitted in a timely fashion and that
26

1 good cause exists for granting the extension. Good cause includes, but is not limited to, the
2 following.

3 (1) Circumstances beyond the reasonable control and despite the due
4 diligence of the Defendants including delays caused by unrelated third parties or Ecology, such
5 as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents
6 submitted by the Defendants; or

7 (2) Acts of God, including fire, flood, blizzard, extreme temperatures,
8 storm, or other unavoidable casualty; or

9 (3) Endangerment as described in Section XVIII.

10 However, neither increased costs of performance of the terms of the Decree nor
11 changed economic circumstances shall be considered circumstances beyond the reasonable
12 control of the Defendants.

13 C. Ecology may extend the schedule for a period not to exceed ninety (90) days,
14 except where longer extension is needed as a result of:

15 (1) Delays in the issuance of a necessary permit which was applied for in a
16 timely manner; or

17 (2) Other circumstances deemed exceptional or extraordinary by Ecology;
18 or

19 (3) Endangerment as described in Section XVIII.

20 Ecology shall give the Defendants written notification in a timely fashion of any
21 extensions granted pursuant to this Decree.

22 XVIII. ENDANGERMENT

23 In the event Ecology determines that activities implementing or in noncompliance with
24 this Decree, or any other circumstances or activities are creating, or have the potential to
25 create, a danger to the health or welfare of the people on or near the Site or to the environment,
26 Ecology may order the Defendants to stop further implementation of this Decree for such

1 period of time as needed to abate the danger. Alternately, Ecology may petition the Court for
2 an order as appropriate. During any stoppage of work under this Section, the obligations of the
3 Defendants with respect to the work under this Decree, which is ordered to be stopped, shall be
4 suspended and the time periods for performance of that work, as well as the time period for any
5 other work dependent upon the work which is stopped, shall be extended, pursuant to Section
6 XVII of this Decree, for such period of time as Ecology determines is reasonable under the
7 circumstances.

8 In the event the Defendants determine that activities undertaken in furtherance of this
9 Decree or any other circumstances or activities are creating an endangerment to the people on
10 the Site or in the surrounding area or to the environment, the Defendants may stop
11 implementation of this Decree for such period of time necessary for Ecology to evaluate the
12 situation and determine whether the Defendants should proceed with implementation of the
13 Decree or whether the work stoppage should be continued until the danger is abated.
14 Defendants shall notify Ecology's project coordinator as soon as possible, but no later than
15 twenty-four (24) hours after such stoppage of work, and thereafter provide Ecology with
16 documentation of the basis for the work stoppage. If Ecology disagrees with the Defendants'
17 determination, it may order Defendants to resume implementation of this Decree. If Ecology
18 concurs with the work stoppage, Defendants' obligations shall be suspended and the time
19 period for performance of that work, as well as the time period for any other work dependent
20 upon the work which was stopped, shall be extended, pursuant to Section XVII of this Decree,
21 for such period of time as Ecology determines is reasonable under the circumstances. Any
22 disagreements pursuant to the clause shall be resolved through the dispute resolution
23 procedures in Section XV.

24 **XIX. OTHER ACTIONS**

25 Ecology reserves its rights to institute remedial action(s) at the Site and subsequently
26 pursue cost recovery, and Ecology reserves its rights to issue orders and/or penalties or take

1 any other enforcement action pursuant to available statutory authority under the following
2 circumstances:

3 (1) Where Defendants fail, after notice, to comply with any requirement of this
4 Decree;

5 (2) In the event or upon the discovery of a release or threatened release not
6 addressed by this Decree;

7 (3) Upon Ecology's determination that action beyond the terms of this Decree is
8 necessary to abate an emergency situation which threatens public health or welfare or the
9 environment; or

10 (4) Upon the occurrence or discovery of a situation beyond the scope of this Decree
11 as to which Ecology would be empowered to perform any remedial action or to issue an order
12 and/or penalty, or to take any other enforcement action. This Decree is limited in scope to the
13 geographic Site described in Exhibits B & D and to those contaminants that Ecology knows to
14 be at the Site when this Decree is entered.

15 Ecology reserves all rights regarding the injury to, destruction of, or loss of natural
16 resources resulting from the release or threatened release of hazardous substances from the
17 Roderick Timber Site.

18 Ecology reserves the right to take any enforcement action whatsoever, including a cost
19 recovery action, against potentially liable persons not party to this Decree.

20 **XX. INDEMNIFICATION**

21 A. Defendants agree to indemnify and save and hold the State of Washington, its
22 employees, and agents harmless from any and all claims or causes of action for death or
23 injuries to persons or for loss or damage to property arising from or on account of acts or
24 omissions of the Defendants, their officers, employees, agents, or contractors in implementing
25 this Decree. However, the Defendants shall not indemnify the State of Washington nor save
26 nor hold its employees and agents harmless from any claims or causes of action arising out of

1 the intentional or negligent acts or omissions of the State of Washington, or the employees or
2 agents of the State, in implementing the activities pursuant to this Decree.

3 B. Ecology agrees to indemnify and save and hold the Defendants, their agents
4 and employees harmless from any and all claims or causes of action for death or injuries to
5 persons or for loss or damage to property arising from or on account of acts or omissions of
6 Ecology, its employees, agents, or contractors in implementing this Decree. However,
7 Ecology shall not indemnify the Defendants nor save nor hold their employees and agents
8 harmless from any claims or causes of action arising out of the intentional or negligent acts or
9 omissions of the Defendants, or the employees or agents of the Defendants, in implementing
10 the activities pursuant to this Decree.

11 **XXI. COMPLIANCE WITH APPLICABLE LAWS**

12 A. All actions carried out by Defendants pursuant to this Decree shall be done in
13 accordance with all applicable federal, state, and local requirements, including requirements to
14 obtain necessary permits, except as provided in Paragraph B of this Section.

15 B. Pursuant to RCW 70.105D.090(1), the substantive requirements of Chapters
16 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing
17 local government permits or approvals for the remedial action under this Decree that are
18 known to be applicable at the time of entry of the Decree have been included in Exhibit A, the
19 Cleanup Action Plan, and are binding and enforceable requirements of the Decree.

20 The Defendants have a continuing obligation to determine whether additional permits
21 or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
22 action under this Decree. In the event any party determines that additional permits or
23 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
24 action under this Decree, it shall promptly notify the other parties of this determination.

25 Ecology shall determine which party shall be responsible to contact the appropriate state and/or
26 local agencies. If Ecology so requires, the Defendants shall promptly consult with the

1 appropriate state and/or local agencies and provide Ecology with written documentation from
2 those agencies of the substantive requirements those agencies believe are applicable to the
3 remedial action. Ecology shall make the final determination on the additional substantive
4 requirements that must be met by the Defendants and on how the Defendants must meet those
5 requirements. Once established by Ecology, the additional requirements shall be enforceable
6 requirements of this Decree. The Defendants shall not begin or continue the remedial action
7 potentially subject to the additional requirements until the parties have reached agreement.

8 Ecology shall ensure that notice and opportunity for comment is provided to the public
9 and appropriate agencies prior to establishing the substantive requirements under this Section.

10 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
11 exemption from complying with the procedural requirements of the laws referenced in RCW
12 70.105D.090(1) would result in the loss of approval from a federal agency, which is necessary
13 for the State to administer any federal law, the exemption shall not apply and the Defendants
14 shall comply with both the procedural and substantive requirements of the laws referenced in
15 RCW 70.105D.090(1), including any requirements to obtain permits.

16 **XXII. REMEDIAL AND INVESTIGATIVE COSTS**

17 The Defendants agree they are liable for costs incurred by Ecology pursuant to this
18 Decree. These costs shall include work performed by Ecology or its contractors for, or on, the
19 Site under RCW 70.105D both prior to and subsequent to the issuance of this Decree for
20 investigations, remedial actions, and Decree preparation, negotiations, oversight and
21 administration. Ecology costs shall include costs of direct activities and support costs of direct
22 activities as defined in WAC 173-340-550(2). The Defendants agree to pay the required
23 amount within ninety (90) days of receiving from Ecology an itemized statement of costs that
24 includes a summary of costs incurred, an identification of involved staff, and the amount of
25 time spent by involved staff members on the project. A general statement of work performed
26 will be provided upon request. Itemized statements shall be prepared quarterly. Failure to pay

1 Ecology's costs within ninety (90) days of receipt of the itemized statement will result in
2 interest charges.

3 **XXIII. IMPLEMENTATION OF REMEDIAL ACTION**

4 If Ecology determines that the Defendants have failed without good cause to implement
5 the remedial action, Ecology may, after notice to the Defendants, perform any or all portions of
6 the work required under this Decree that remain incomplete. If Ecology performs all or
7 portions of the remedial action because of the Defendants' failure to comply with obligations
8 under this Decree, Defendants shall reimburse Ecology for the costs of doing such work in
9 accordance with Section XXII, provided that Defendants are not obligated under this section to
10 reimburse Ecology for costs incurred for work inconsistent with or beyond the scope of this
11 Decree.

12 **XXIV. PUBLIC PARTICIPATION**

13 Ecology shall maintain the responsibility for public participation at the Site. However,
14 the Defendants shall cooperate with Ecology and, if agreed to by Ecology, shall:

15 A. Prepare drafts of public notices and fact sheets at important stages of the
16 remedial action, such as the submission of work plans and engineering design reports. Ecology
17 will finalize (including editing if necessary) and distribute such fact sheets and prepare and
18 distribute public notices of Ecology's presentations and meetings;

19 B. Notify Ecology's project coordinator prior to the preparation of all press
20 releases and fact sheets and before major meetings with the interested public and local
21 governments. Likewise, Ecology shall notify the Defendants prior to the issuance of all press
22 releases and fact sheets, and before major meetings with the interested public and local
23 governments;

24 C. Participate in public presentations on the progress of the remedial action at the
25 Site. Participation may be through attendance at public meetings to assist in answering
26 questions or as a presenter;

1 D. In cooperation with Ecology, arrange and/or continue information repositories
2 to be located at City of Aberdeen, Planning Department, 200 East Market Street, Aberdeen,
3 WA, and Ecology's Southwest Regional Office, 300 Desmond Drive, Lacey, WA. At a
4 minimum, copies of all public notices, fact sheets, and press releases; all quality assured
5 ground water, surface water, soil, and air monitoring data; remedial actions plans;
6 supplemental remedial planning documents; and all other similar documents relating to
7 performance of the remedial action required by this Decree shall be promptly placed in these
8 repositories.

9 **XXV. FIVE YEAR REVIEW**

10 As remedial action, including ground water monitoring, continues at the Site, the
11 parties agree to review the progress of remedial action at the Site, and to review the data
12 accumulated as a result of Site monitoring as often as is necessary and appropriate under the
13 circumstances. At least every five years, the parties shall meet to discuss the status of the Site
14 and the need, if any, of further monitoring and/or remedial action at the Site. Ecology reserves
15 the right to require further monitoring and/or remedial action at the Site under appropriate
16 circumstances. This provision shall remain in effect for the duration of the Decree.

17 **XXVI. DURATION OF DECREE**

18 This Decree shall remain in effect and the remedial program described in the Decree as
19 elaborated in the Cleanup Action Plan (Exhibit A) and Scope of Work/Schedule (Exhibit E)
20 shall be maintained and continued until the Defendants have received written notification from
21 Ecology that the requirements of this Decree have been satisfactorily completed.

22 **XXVII. CLAIMS AGAINST THE STATE**

23 Defendants hereby agree that they will not seek to recover any costs accrued in
24 implementing the remedial action required by this Decree from the State of Washington or any
25 of its agencies; and further, that the Defendants will make no claim against the State Toxics
26 Control Account or any Local Toxics Control Account for any costs incurred in implementing

1 this Decree. Except as provided above, however, the Defendants expressly reserve the right to
2 seek to recover any costs incurred in implementing this Decree from any other potentially
3 liable person.

4 The submission of an application for grant funding per RCW 70.105D.070(3) shall not
5 be deemed to be the filing of a “claim” for the purposes of this Section.

6 **XXVIII. COVENANT NOT TO SUE**

7 In consideration of the Defendants’ compliance with the terms and conditions of this
8 Decree, Ecology covenants not to institute legal or administrative actions against the
9 Defendants regarding the release or threatened release of hazardous and deleterious substances
10 covered by this Decree. Until cleanup standards are met and maintained at the Site, or unless
11 confirmational monitoring demonstrates that additional remedial actions are necessary at the
12 Site, compliance with this Decree shall satisfy the Defendants’ obligations related to the
13 hazardous or deleterious substances covered by this Decree.

14 The terms and application of this Consent Decree are strictly limited to the Site, as
15 defined in Exhibits B and D, and to those hazardous and deleterious substances that are
16 covered by this Decree. The Decree is not applicable to any other hazardous or deleterious
17 substance or area and Ecology retains its authority in such areas not covered in this Decree.

18 Ecology specifically reserves the right to institute legal or administrative action against
19 the Defendants seeking to require the Defendants to perform additional response actions at the
20 Site, and to pursue appropriate cost recovery in accordance with provisions set out in
21 RCW 70.105D.050, under the following circumstances:

- 22 (1) Upon Defendant’s failure to meet the requirements of this Decree;
23 (2) Upon Ecology’s determination that action beyond the terms of this
24 Decree is necessary to abate an imminent and substantial endangerment to public health or
25 welfare or the environment; or
26

1 (3) Upon discovery of factors not known at the time of entry of this Decree
2 when they present a previously unknown threat to human health or the environment,
3 whereupon the covenant not to sue in this Section XXVIII shall also be amended.

4 B. Applicability: Any Covenant Not To Sue concerning work performed under
5 this Consent Decree shall have no applicability whatsoever to:

6 (1) Criminal liability;

7 (2) Any Ecology action against potentially liable persons not a party to this
8 Decree, including cost recovery;

9 (3) Liability for Natural Resource Damages.

10 This covenant is expressly limited to the Site as defined in Exhibit D and to those hazardous
11 and deleterious substances of which Ecology has notice.

12 **XXIX. RESERVATION OF RIGHTS**

13 While the Parties believe that the recitals contained in this Decree are accurate, the
14 execution and performance of the Decree is not an admission by the Defendants of any fact or
15 liability for any purpose other than as a foundation for the entry of this Decree. The
16 Defendants' performance under the Decree is undertaken without waiver of or prejudice to any
17 claims or defenses whatsoever that may be asserted in the event of further administrative
18 proceedings or litigation about or relating to the Site, with the sole exception of an action by
19 Ecology to enforce this Decree. Nor does the execution or performance of this Decree
20 constitute agreement by the Defendants to take any action at the Site other than those
21 designated in this Decree.

22 **XXX. CONTRIBUTION PROTECTION**

23 With regard to claims for contribution against Defendants for matters addressed in this
24 Decree, Ecology agrees that Defendants, their Successors in Interest and Assigns are entitled
25 to protection from contribution actions or claims as is provided by MTCA, RCW
26 70.105D.040, CERCLA § 107 or 113, or any other federal or state claim seeking, under other

1 theories, substantially similar relief, to the extent allowed by MTCA, RCW 70.105D.040 and
2 CERCLA § 113(f)(2). The contribution protection conferred in this section shall not be
3 frustrated by the use of non-CERCLA or non-MTCA theories to seek relief in the nature of
4 contribution or indemnification.

5 For purposes of this Section, “matters addressed” include all remedial actions taken or
6 to be taken and all remedial action costs (including Ecology’s oversight costs) incurred or to be
7 incurred by Ecology or any other person with respect to the Site. “Matters addressed” do not
8 include those remedial actions or remedial action costs as to which Ecology has reserved its
9 rights under this Consent Decree (except for claims for failure to comply with this Decree), if
10 Ecology asserts rights against Defendant coming within the scope of such reservations.

11 **XXXI. EFFECTIVE DATE**

12 This Decree is effective upon the date it is entered by the Court.

13 **XXXII. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

14 This Decree has been the subject of public notice and comment under RCW
15 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to
16 a more expeditious cleanup of hazardous substances at the Site.

17 If the Court withholds or withdraws its consent to this Decree, it shall be null and void
18 at the option of any party and the accompanying complaint shall be dismissed without costs
19 and without prejudice. In such an event, no party shall be bound by the requirements of this
20 Decree.

21
22 _____
23 JAMES J. PENDOWSKI
24 Toxics Cleanup Program

25 Date: _____
26

1 _____
2 City of Aberdeen

_____ Grays Harbor Historical Seaport Authority

3 _____
4 Date: _____

_____ Date: _____

5 THIS DECREE is approved and IT IS SO ORDERED this _____ day of
6 _____, 2003.

7 _____
8 SUPERIOR COURT JUDGE
9 Grays Harbor County Superior Court
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26